No. 14,753

IN THE

United States Court of Appeals

For the Ninth Circuit

LAU AH YEW,
Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

This is an appeal from the District Court's order striking the complaint and dismissing the action on the ground that the complaint is sham and false (R. 20, 21).

The action is under 8 U.S.C., Section 903 for declaration pursuant to that section that plaintiff-appellant was a national of the United States (R. 3-8).

The District Court had jurisdiction under 8 U.S.C., Section 903. The order to strike and to dismiss was

filed on February 8, 1955 (R. 21). Notice of appeal was filed on April 7, 1955 (R. 22). This Court had jurisdiction to review the order to strike and to dismiss under 28 U.S.C., Sections 1291 and 1294 (1).

STATEMENT OF PLEADINGS.

On April 26, 1954, the Second Amended Complaint was filed (R. 8). On May 7, 1954, a motion to dismiss the second amended complaint was filed. On May 26, 1954, an order overruling motion to dismiss was filed. On May 25, 1954, interrogatories were served on appellant's attorney (R. 14). At some date after June 3, 1954, answers to interrogatories were filed with the United States District Court for the District of Hawaii (R. 16) but were not served on appellee until January 26, 1955 (Appellant's Brief, p. 7). The motion for application for entry of default was filed on January 13, 1955, and was denied on January 26, 1955, judgment being ordered to be entered forthwith by the Court, although at a later date a written order denying application for entry of default judgment was filed (R. 20). On the date that the default judgment was denied (January 26, 1955), the appellee was given ten days in which to answer. Within that ten days, and on January 31, 1955, the motion to strike was filed and scheduled for hearing within ten days (R. 1 and 17).

The motion to strike was granted (R. 21 and 24-28). From the order to strike and to dismiss, and the order denying application for entry of default, appellant

filed a notice of appeal and points to be relied upon on appeal (R. 22, 31).

The questions as to the propriety of the motion to strike and to dismiss was raised by appellant's opposition to the motion to strike.

The question as to whether a default should have been entered by the District Court is raised by appellee's opposition to the application for entry of default and the subsequent order of the Court denying the application for entry of default (R. 17, 18, 19, 20).

STATUTES INVOLVED.

The only statute involved is Section 503 of the Nationality Act of 1940, 8 U.S.C., Section 903, 54 Stat. 1171, found in appellant's brief.

STATEMENT OF FACTS.

The pertinent facts involved in this case are taken from the second amended complaint (R. 3-8). Appellant claims he is a citizen of the United States of America, having been born in Honolulu on February 1, 1898 (R. 3), that he claims permanent residence in the United States and Hawaii on the basis that for a period of thirty-two years he resided continuously in the Territory of Hawaii (R. 6); that in June of 1952 the appellant personally applied to the American Consulate General at Hong Kong for a United States passport (R. 5); that pursuant to appellant's appli-

cation for a United States passport he was interviewed by the Vice Consul in charge of processing applications for United States passports (R. 5); that at this interview appellant produced certain documents shown in appellant's Exhibits "A", "B", "C", "D", "E", "F", "G", attached to his affirmation made on February 6, 1954; and that he testified to his birth in Hawaii (R. 5); that at the conclusion of said interview said Vice Consul returned to the appellant all the above described documentary evidence tending to prove his United States citizenship and denied his application for a United States passport upon the ground that he was not a national of the United States (R. 6); and the refusal of the appellee by and through his official executive to issue to appellant said United States passport is the denial of a right or privilege of a United States citizen on the ground that he is not a national of the United States.

The interrogatories by appellee of the appellant revealed the following:

"Q.(3) Describe the manner in which you made the application for a United States passport at the American Consulate in Hong Kong in June, 1952.

A.(3) Firstly, by written letter to the Consulate General in May, 1952. On receiving no reply, I called in June, 1952, on one occasion and interviewed the persons described in Reply No. 2. (Reply No. 2 is the description of the Vice Consul who interviewed appellant.)

Q.(4) List and describe all the documents and any other evidence of American citizenship presented by

you at the time you reportedly applied for a United States passport at the American Consulate in Hong Kong in June, 1952.

A.(4) I produced:

(a) Identification Card of the U. S. Army dated 16th February, 1943, issued in Honolulu.

(b) Government Identity Card with a set of finger prints dated 4th January, 1942, issued in Honolulu.

(c) Hawaii Defense Volunteer Discharge paper in the name of "Yee Yew Lau" dated 5th July, 1945.

(d) Tax release dated 19th May, 1947—issued in Honolulu.

(e) Letter from the Honolulu Immigration Office certifying that that office refused to give me back my birth and citizenship certificate and a certificate or letter by one Yee Tim of my birth in Honolulu.

Q.(5) Did you at that time present an identifying witness who was a United States citizen?

A.(5) No.

Q.(6) Did you ever at any time present at the American Consulate in Hong Kong an identifying witness who was an American citizen?

A.(6) No.

Q.(7) Have you ever presented to the American Consulate in Hong Kong a birth certificate?

A.(7) No.

Q.(8) At the interview with the American Vice Consul in Hong Kong in June, 1952, did the Vice Consul tell you you had not presented sufficient evidence to establish your identity?

A.(8) Yes.

Q.(9) At the interview with the American Vice Consul in Hong Kong in June, 1952, did the Vice Consul tell you you had not presented sufficient evidence to establish the fact that you were born in the United States?

A.(9) Yes.

Q.(10) Did the Vice Consul tell you that he was not satisfied that you were an American citizen?

A.(10) Yes.

Q.(11) Did the Vice Consul advise you as to what further type of evidence you should submit in order to establish your American citizenship?

A.(11) No, but he asked me for other evidence, and I said that I had produced all the evidence available. I cannot remember the questions which he asked me.

Q.(12) Did the Vice Consul tell you that he was satisfied that you were not an American citizen?

A.(12) He said 'I believe you are not an American citizen' or words to that effect."

From the above questions and answers it is clear that although the appellant alleges in his complaint that he applied for a passport, that actually he did no such thing. Secondly, that if there were any type of informal application for a passport, that there was no denial of this passport or application, whatever it may have been. The Court ruled in this case that appellant had not complied with Rule 11; that the actual facts as they appear in appellant's answers to appellee's interrogatories do not fit together at all to the allegations contained in the second amended complaint, and that consequently the second amended com-

plaint was sham and false and should be stricken. In particular, those allegations which allege that a passport was applied for and denied are sham and false in view of the answers to the interrogatories of the appellee.

QUESTIONS PRESENTED.

1. Did the Court err in failing to enter a default judgment against the Secretary of State upon his failure to file an answer within the required time?

2. Did the Court err in striking the complaint and dismissing the action?

ARGUMENT.

I

DENIAL OF THE APPLICATION FOR JUDGMENT BY DEFAULT.

The granting or denial of an application for a default judgment lies within the sound discretion of the trial Court. (*Missouri Ex Rel. De Vault v. The Fidelity & Casualty Co.,* 8 Cir. 1939, 107 F.2d 343; *Latini v. R. M. Dubin Corporation,* (N.D. Ill. 1950), 90 F. Supp. 212.) Since this matter is within the sound discretion of the trial Court, its decision may only be overturned if there is an abuse of that discretion. *National Ben. Life Ins. Co. v. Shaw-Walker,* 111 F.2d 497, cert. den. 311 U.S. 673; *Delno v. Market St. Ry. Co.,* 124 F.2d 965; *Federal Trade Comm. v. Tomsen-King & Co.,* 109 F.2d 516.

Some of the facts which the Court may consider in exercising its discretion are whether the appellant will be prejudiced and, if so, the extent thereof; whether the entry of the default judgment would result in injustice. *Ciccarello v. Joseph Schlitz Brewing Co.,* (S.D.W.Va., 1941), 1 F.R.D. 491; *Protective Union Inc., v. Great Atlantic & Pacific Tea Co.,* (E.D. Ark., 1949) 83 F. Supp. 646; *Interstate Commerce Commission v. Smith* (E.D. Pa.) 82 F. Supp. 39. A good discussion concerning the Court's discretion is found in *Henry v. Metropolitan Life Insurance Co.,* (W.D. Va., 1942) 3 F.R.D. 142-144.

The question in reality then becomes one of whether the trial Court has indeed abused its discretion. We think not. As a matter of fact, the trial Court did exercise sound discretion. As has been stated by trial Courts and by Courts of Appeal, citizenship is a precious thing and it is neither granted nor denied without proper adjudication. *Wong Wing Foo v. McGrath,* 9 Cir., 196 F.2d 120, 122; *Lee Hong v. Acheson,* 110 F. Supp. 60.

As will be noted by an examination of the docket entries herein, on January 10, 1955, a motion to take an oral deposition of the plaintiff was filed. On January 13, 1955, this motion was withdrawn, and the application for the entry of judgment by default was filed.

Apparently, the appellant discovered that the appellee had not filed an answer in this proceeding and was in a hurry to take the best advantage possible of the situation as it then stood. There was, as will be

noted, no entry of default by the clerk in this matter, pursuant to Rule 55(a), Federal Rules of Civil Procedure. If the oral deposition had been taken, appellant would have been in a much better position to proceed with a *prima facie* case under Rule 55(e), Federal Rules of Civil Procedure.

Appellant states that the substantial rights of the appellee would not have been affected for, under Rule 55(e), he must present evidence satisfactory to the Court concerning defaults against the United States. This statement of course could not be more clearly wrong. In an adjudication of citizenship the Court, because of the nature of citizenship, should have before it both sides of the problem. Appellant states that having one side present evidence is not prejudicing the substantive rights of the appellee. This statement, we contend, is absolutely erroneous.

Appellant's contention that the Court's ground for denying the motion for default is that default judgments with respect to citizenship were not favored by the Court is erroneous.

As has been stated in appellant's brief, *Klapprott v. U. S.*, 335 U.S. 601, left this question undecided. However, it will be noted that in the *Klapprott* case, the proceedings were returned to the District Court with instructions to exercise its sound discretion concerning whether a default judgment should be set aside.

Appellant states merely that the granting of the application for default, or that the holding in abey-

ance of the application for default would do nothing more than give the appellant time to apply for and receive travel documents from the United States Consul in Hong Kong to come to the United States and prosecute his claim. It is a well known fact that many cases of this nature have been disposed of on the merits by use of depositions of plaintiffs who were unable to get travel documents from the Department of State. *Wong Doo Ning v. Dulles,* D.C., DC (unreported); *Leung Yin-Jue by his friend Leung Hing v. Dulles,* Civil No. 1446-SD, S.C. Cal. (unreported).

Indeed, counsel for appellant is well aware of this method of disposing of citizenship cases on their merits. *Fong Ah Kwai v. Dulles,* Civil No. 1182 (US DC-Hawaii), a case in which counsel for appellant was and still is counsel for the plaintiff herein and is scheduled for trial upon oral depositions of the plaintiff.

It is the contention of the appellee that the Court properly denied the application for a judgment by default in that because of the nature of citizenship the Courts of this country should be loathe to declare it without a full adjudication on the merits; that the appellant was not ready to proceed with presenting his *prima facie* case, and that he well knew that he could have been ready for it by presenting oral depositions of the appellant if he was unable to secure a Certificate of Identity from the Department of State. Third, that as an added circumstance, the fact that the appellant himself was negligent in serving appellee with answers to the interrogatories requested, within the

time allotted by Rule 33 of Federal Rules of Civil Procedure or even within a reasonable time, although not determinative in itself, should and probably did bear some weight with the District Court's decision.

II

THE GRANTING OF THE MOTION TO STRIKE AND THE DISMISSAL OF THE ACTION ARE PROPER.

The Court will note that this motion to strike is filed under Rule 11 of Federal Rules of Civil Procedure in that the appellee contends that the second amended complaint filed herein is sham and false.

This is a proceeding under the Nationality Act of 1940, 8 USCA, 903, which reads in part as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States . . . "

The pertinent portions of the second amended complaint, which will be discussed and which are vital to the appellant's action, are as follows:

> " . . . the plaintiff, in June 1952, personally applied at the American Consulate General at Hongkong for a United States passport; . . . that, pursuant to plaintiff's application for a United States passport, he was interviewed by the Vice Consul in charge of the processing of applications for United States passports; . . . that, at the conclusion of said interview, said Vice Consul, as the executive officer in charge of the processing of applications for United States passports, returned to the plaintiff all the above described documentary evidence tending to prove his United States citizenship and denied his application for a United States passport to enter the United States upon the ground that he was not a national of the United States; that it was the opinion of the Vice Consul that the proof offered and presented to him was insufficient to establish plaintiff's United States citizenship; . . . and, the refusal of the defendant by and through his official executive, to-wit: The American Consulate General in Hongkong, to issue to him said United States passport is the denial of a right or privilege of a United States citizen on the ground that he is not a national of the United States."

It may appear from the above quoted portions of Paragraph III that the appellant has used all the words necessary to bring his action within the scope of Section 503 of the Nationality Act of 1940. However, it would be well to examine these allegations in the light of the interrogatories and answers to interrogatories. It is the contention of the appellee that no application for a United States passport was made in June, 1952. In support of this contention appellee sub-

mits questions 3, 4, 5, 6 and 7, and the answers thereto, of the interrogatories:

"Q. 3 Describe the manner in which you made application for a United States passport at the American Consulate in Hong Kong in June, 1952.

A. 3 Firstly by written letter to the Consulate General in May 1952. On receiving no reply I called in June 1952 on one occasion and interviewed the persons described in Reply No. 2.

Q. 4 List and describe all the documents and any other evidence of American citizenship presented by you at the time you reportedly applied for a United States passport at the American Consulate in Hong Kong in June 1952.

A. 4 I produced:

(a) Identification Card of the U.S. Army dated 16th February 1943 issued in Honolulu.

(b) Government Identity Card with a set of finger prints dated 4th January 1942 issued in Honolulu.

(c) Hawaii Defense Volunteer Discharge Paper in the name "Yee Yew Lau" dated 5th July 1945.

(d) Tax Release dated 19th May 1947—issued in Honolulu.

(e) Letter from the Honolulu Immigration Office certifying that that Office refused to give me back my birth and citizenship certificate and a certificate or letter by one Yee Tim of my birth in Honolulu.

Q. 5 Did you at that time present an identifying witness who was a United States citizen?

A. 5 No.

Q. 6 Did you ever at any other time present at the American Consulate in Hong Kong an identifying witness who was an American citizen?

A. 6 No.

Q. 7 Have you ever presented to the American Consulate in Hong Kong a birth certificate?

A. 7 No."

From these questions and answers it is clear, first, that no formal application for a passport was made by the appellant in June, 1952. He states that he made application for a United States passport by written letter to the Consulate General in May, 1952, and, by calling in June, 1952, on one occasion and being interviewed by a United States Vice Consul, and by at that time producing the documents enumerated in the answer to question No. 4.

Title 22, Code of Federal Regulations, Section 51.14 provides:

> "Before a passport is issued to any person by or under the authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths. . . ."

The appellant herein obviously did not, in June, 1952, submit a written application, as provided in the Code of Federal Regulations, upon which a Consul General could act in granting or denying a passport application.

There was no denial of any sort made in June, 1952. What was done was that upon the first interview of the appellant the United States consular official asked for more evidence concerning the appellant's claim to citizenship and his right to be issued a United

States passport. In support of this contention, questions 8, 10, 11 and 12, and the answers thereto are as follows:

"Q. 8 At the interview with the American Vice Consul in Hong Kong in June 1952 did the Vice Consul tell you you had not presented sufficient evidence to establish your identity?

A. 8 Yes.

Q. 10 Did the Vice Consul tell you that he was not satisfied that you were an American citizen?

A. 10 Yes.

Q. 11 Did the Vice Consul advise you as to what further type of evidence you should submit in order to establish your American citizenship?

A. 11 No, but he asked me for other evidence and I said that I had produced all the evidence available. I cannot remember the questions which he asked me.

Q. 12 Did the Vice Consul tell you that he was satisfied that you were not an American citizen?

A. 12 He said 'I believe you are not an American citizen' or words to that effect."

It will be noted that appellant has answered that the Vice Consul, in June, 1952, told him that he had not presented sufficient evidence to establish his identity. Secondly, that the Vice Consul told him that he was not satisfied that he was an American citizen and he admits that the Vice Consul had asked for some other evidence, although he cannot at this time state what questions or what evidence the Vice Consul asked for. Thirdly, the appellant alleges that the Vice Consul stated to him: "'I believe you are not an American citizen' or words to that effect," so that

the only statement which the appellant made was that the Vice Consul believed that upon the conclusion of the interview that he, the appellant, was not a citizen.

Again is would be well to refer to Title 22 of the Code of Federal Regulations, Section 51.14, which requires that a formal application be filed before a passport be issued. Title 22, Code of Federal Regulations, Section 51.23 sets out in detail the documents and witnesses and other evidence which is necessary for an applicant to present to be issued a passport. It is noted under Paragraph (r):

> "When the applicant applies for a passport he should be accompanied by one credible witness who is an American citizen, has known the applicant for a period of 2 or more years, and has a definite place of residence."

Answers to interrogatories 5 and 6 reveal that appellant never has presented an identifying witness.

Title 22, Code of Federal Regulations, Section 51.51 relates to evidence of citizenship to accompany application for a passport. This section relates directly to the above contention that there was no denial made and no compliance with basic requirements. It provides that a birth certificate, or several other possibilities to prove birth, accompany an application for a passport. These are: 1. Birth certificate; 2. Baptismal certificate; 3. Affidavit of a parent or physician, nurse or midwife who attended the birth; or, 4. An affidavit of a reputable person with sufficient knowledge to testify as to place and date of applicant's birth.

It is interesting to note that not *one* of the above requirements was met by petitioner. Reference is made to question 4 and the answer contained therein, and particularly to answer 4(e) in which appellant states "the Honolulu Immigration Office refused to give me back my birth . . . certificate."

If in reality appellant does have and is entitled to a Bureau of Vital Statistics certificate of birth or a certificate of Hawaiian birth issued by the Secretary of Hawaii, he could, without much difficulty, secure copies of either by which his problems would be well on the way to solution.

Appellant has alleged that he personally applied at the American Consulate General in Hong Kong for a United States passport; that he was interviewed, presumably on the same day; and that his passport was denied on the ground that he was not a national of the United States.

The first allegation, that he applied for a passport, is not substantiated by appellant's own answers to interrogatories. The second allegation, that the passport application was then and there denied by the Vice Consul of the United States, also is not substantiated by appellant's answers to interrogatories in which he states: 1. That appellant has not presented a birth certificate; 2. that appellant has not presented an identifying witness; 3. that the Vice Consul informed him that he had not presented sufficient evidence to establish his identity; 4. that the Vice Consul advised him that he should submit other evidence, and 5. that the Vice Consul stated that he

believed that appellant was not a United States citizen. This is the strongest answer which the appellant could truthfully give concerning the question of the denial of his "application for a passport in June, 1952."

Appellant could not have been issued a passport until he had executed the formal written application for one, which he apparently did some seven months later on January 11, 1953. In view of these answers to the interrogatories which do not substantiate the allegations of the second amended complaint this second amended complaint now falls within the purview of *Lung v. United States,* 212 F.2d 73.

Further, this case is distinguishable from *Young Jin Teung v. Dulles,* (2 Cir. 1956) 229 F.2d 244; *Chin Chuck Ming v. Dulles,* (9 Cir. 1955), 225 F.2d 849; *Wong Ark Kit v. Dulles,* (DC D.Mass. 1955), 127 F. Supp. 871; *Ow Yeong Yung v. Dulles,* (DC N.D. Cal. 1953), 166 F. Supp. 766, which held that an unreasonable delay or unreasonable requests for evidence in processing an application for a passport could constitute a denial under certain circumstances. Here, the appellant is claiming that on the very day that he appeared for an interview without filing an application for a passport, his passport was denied. Nor do we believe that this particular situation is one which would normally fall within those contemplated in *Wong Wing Foo v. McGrath,* 196 F.2d 120, for it is apparent that in that case what was contemplated was a situation where the administrative officer refused to allow the applicant (the appellant in this case) to

apply for a passport or to apply for a right; and consequently he would have, therefore, no administrative remedies to pursue. He would be cut off before he had a chance to have any administrative action. This is not the case here. The case here is more as characterized by the trial Court, that is, of a person who is seeking information and advice concerning an application for a right or privilege which he may make at some future date and which in this case he did make in January of 1953.

CONCLUSION.

It is submitted that the application for judgment by default was properly denied and that the motion to strike under Rule 11 was properly granted. The judgment should be affirmed.

Dated, Honolulu, T.H.
May 23, 1956.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.